Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
RECEIVED

JUL 25 1997

In re Applications of	)	
	)	
Martin W. Hoffman, Trustee-in-Bankruptcy	)	MM Docket No. 97-128
for Astroline Communications Company	)	
Limited Partnership	)	
	)	
For Renewal of License of	)	File No. BRCT-881202KF
Station WHCT-TV, Hartford, Connecticut	)	
	)	
and	)	
	)	
Shurberg Broadcasting of Hartford	)	
	)	
For Construction Permit for a New	)	File No. BPCT-831202KF
Television Station to Operate on	)	
Channel 18, Hartford, Connecticut	)	

To: The Honorable John M. Frysiak
Administrative Law Judge

PETITION FOR EMERGENCY RELIEF AND STAY PROCEEDINGS

Respectfully submitted,

RICHARD P. RAMIREZ

FISHER WAYLAND COOPER
LEADER & ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006-1831
(202) 659-3494

Kathryn R. Schmeltzer
C. Brooke Temple III
Colette M. Capretz

Counsel for Richard P. Ramirez

Date: July 25, 1997

TABLE OF CONTENTS

SUMMARY

Richard P. Ramirez ("Ramirez" or the "Petitioner") is filing this Petition for Emergency Relief and Stay of Proceedings because there is an urgent need for the Commission to reconsider its decision to designate a misrepresentation issue in this proceeding. When the Commission released its Hearing Designation Order (the "HDO") adding the misrepresentation issue against the Trustee's license renewal application, it did so on the basis of a 3½ year old pleading filed by Shurberg Broadcasting of Hartford ("Shurberg") which presented allegations from one party in pleadings filed in a Connecticut bankruptcy case involving Astroline Communications Company Limited Partnership ("ACCLP"). Because Shurberg's allegations were in turn based on "allegations" by one party to the bankruptcy proceeding, and Shurberg never alerted the Commission to the decisions that were reached, the Commission did not review the arguments of the other party to the bankruptcy proceeding or consider the decision reached by the U.S. Bankruptcy Court, District of Connecticut. That decision was affirmed by the United States District Court, District of Connecticut and ultimately by the U.S. Court of Appeals for the Second Circuit. The bankruptcy litigation conclusively dealt with and rejected the "allegations" that resulted in the HDO. The proceeding before the U.S. Bankruptcy Court lasted for nine trial days and included many witnesses and over 300 exhibits. Significantly, the Bankruptcy Court Judge concluded as follows:

> The court concludes that Astroline Company's [the limited partner's] activities in connection with the Debtor [ACCLP] do not meet the standard of substantially the same as the exercise of powers of a general partner. Despite the intense level of investigation undertaken by the Trustee of the Debtor's prepetition history, the Court would have to engage in conjecture and surmise to find any control of the Debtor's day-to-day operation of the Channel 18 television station. The court credits the testimony of Ramirez, supported by that of Planell and Rozanski, that he, as the managing general partner, exercised fully his powers as such, and that Astroline Company had no equal control in his decisions.

(Attach. A at 14-15) (Emphasis added).

The instant proceeding would involve re-litigating the same matters that the U.S. Bankruptcy Court has already addressed, at great expense to the Commission and the parties. It is evident from the document requests that have been filed that the FCC is seeking the same information that was already produced in the Bankruptcy Court proceeding. Re-litigating these matters violates principles of full faith and credit, is unfair to the Petitioner, is a colossal waste of time and is completely unnecessary. Indeed, the FCC hearing proceeding is particularly unfair to Ramirez, who testified at length in the bankruptcy proceeding and had no notice that the FCC intended to re-litigate the same matters. Ironically, the Commission's proceeding is substantially harming the very minority participant its policies were designed to assist.

Accordingly, the Presiding Judge must stay this proceeding and delete the misrepresentation issue. Such relief is fully supported by the Commission's recent decision to stay the MobileMedia case pending consideration of relief under the Second Thursday policy. See MobileMedia Corporation, et al., FCC 97-197 (released June 6, 1997).

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of	)	
	)	
Martin W. Hoffman, Trustee-in-Bankruptcy	)	MM Docket No. 97-128
for Astroline Communications Company	)	
Limited Partnership	)	
	)	
For Renewal of License of	)	File No. BRCT-881202KF
Station WHCT-TV, Hartford, Connecticut	)	
	)	
and	)	
	)	
Shurberg Broadcasting of Hartford	)	
	)	
For Construction Permit for a New	)	File No. BPCT-831202KF
Television Station to Operate on	)	
Channel 18, Hartford, Connecticut	)	

To: The Honorable John M. Frysiak
Administrative Law Judge

PETITION FOR EMERGENCY RELIEF AND STAY OF PROCEEDINGS

Richard P. Ramirez ("Ramirez" or the "Petitioner"), by his attorneys, hereby requests the Presiding Judge to stay this proceeding and delete the misrepresentation issue designated against Astroline Communications Company Limited Partnership ("ACCLP") in the Memorandum Opinion and Order & Hearing Designation Order in this proceeding, See In re Applications of Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership For Renewal of License of Station WHCT-TV, Hartford, Connecticut, Memorandum Opinion and Order & Hearing Designation Order, FCC 97-146 (released April 28, 1997) (the

"HDO").[1/] The relief requested is justified by (a) the favorable outcome of a Connecticut bankruptcy proceeding involving the very facts that led to the designation for hearing and (b) the Commission's arbitrary and capricious failure to grant relief to Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership ("Trustee") under the Commission's Second Thursday doctrine in light of the Commission's willingness to entertain such relief in the recently released case of MobileMedia Corporation, FCC 97-197 (released June 6, 1997) ("MobileMedia").[2/]

1. This petition is premised on the principle that it is fundamentally unfair, inefficient, counterproductive and contrary to the public interest to re-litigate matters that have already been thoroughly adjudicated in a civil proceeding. The Trustee's application for renewal of license was erroneously designated for hearing based on two significant mistakes. First, the Commission's reliance on 3½ year old allegations advanced by Shurberg Broadcasting of Hartford ("Shurberg") was misplaced. Shurberg failed to apprise the Commission of the court cases disposing of the very allegations it had advanced in support of an issue. In fact, the allegations that led to the designation of the misrepresentation issue concerning ACCLP were only allegations advanced by one party in a bankruptcy proceeding. Those same allegations have

---

[1/] The Presiding Judge has the authority to act on motions to delete hearing issues. See Section 1.243(k) of the Commission's rules. See also Practice and Procedure, 36 R.R.2d 1203 (1976).

[2/] This is the first opportunity that the Petitioner has had to raise these matters. Shurberg never served Ramirez or the other principals of ACCLP with the Commission and court pleadings that led to the HDO, and Ramirez had no opportunity to respond to the allegations or to present his information and position before designation. Ramirez recently retained FCC counsel who has only just had the opportunity to review the transcripts and exhibits in the Connecticut court proceedings. Ramirez was not a party to this proceeding until June 20, 1997 at which time he was granted leave to intervene (See FCC 97M-109, granting Ramirez leave to intervene).

been thoroughly adjudicated and rejected in the civil court system. The U.S. Bankruptcy Court, District of Connecticut, conducted a nine day vigorously-litigated hearing on the operation and conduct of ACCLP which extensively covered the very matters addressed in the HDO. Hoffman v. WHCT Management, Inc. (In re Astroline Communications Co. Ltd. Partnership), 188 B.R. 98 (Bankr. D. Conn. 1995) (Attach. A hereto). The United States District Court, District of Connecticut (Nevas, J.), affirmed the judgment of the Bankruptcy Court (Attach. B), and the United States Court of Appeals for the Second Circuit affirmed the Bankruptcy Court's decision in favor of ACCLP by Summary Order on appeal (Attach. C).

2. During the Bankruptcy Court hearing, the court heard testimony from Ramirez, limited partners of Astroline Company, management-level personnel at the station and partners of the accounting firm of Arthur Andersen, LLP concerning the ownership and control of ACCLP. The court concluded that Ramirez had control of the day-to-day operation of the station and that the limited partners had not acted as general partners of ACCLP. (See Attachs. A-C).

3. Second, the Commission's failure to follow its longstanding Second Thursday doctrine in this case is arbitrary and capricious as stunningly demonstrated by the recent Commission action in MobileMedia, supra. Thus, as further discussed below, this proceeding should be stayed, the designated issue should be deleted, and the case should then be certified to the Commission for reconsideration of the applicability of the Second Thursday doctrine.

I. BACKGROUND

4. In December 1984, the Commission approved ACCLP's application to acquire Station WHCT-TV, Channel 18, Hartford, Connecticut, pursuant to its minority distress sale

policy.[3] See Faith Center, Inc., 99 FCC 2d 1164 (1984). At the same time, the Commission also granted the station's license renewal application, which had been deferred pending the resolution of a hearing to determine the qualifications of the station's prior licensee, Faith Center, Inc. ("Faith Center").[4]

5. As noted in the HDO, in approving the assignment to ACCLP in Faith Center, Inc., the Commission found that ACCLP was a limited partnership comprised of two general partners and one limited partner. (HDO, para. 3). The two general partners were Ramirez, an Hispanic American, and WHCT Management, Inc. As disclosed in the assignment application, Fred J. Boling, Jr. ("Boling") was President of WHCT Management, Inc. As the Commission was aware, the limited partner was Astroline Company. Ramirez held a 21% ownership interest and a 70% voting interest in ACCLP; WHCT Management, Inc. held a 9% ownership interest and a 30% voting interest in ACCLP; and Astroline Company, the sole limited partner of

---

[3] The Commission's distress sale policy has provided an exception to the Commission's general rule against authorizing the assignment or transfer of control of a broadcast license during the pendency of a hearing to resolve the qualifications of a licensee. The policy has allowed broadcasters whose renewal applications have been designated for hearing to assign the station's license to FCC-approved minority enterprises. It was adopted by the Commission as part of its efforts to increase minority opportunities by enabling minority entrepreneurs to capitalize their broadcasting ventures by attracting and utilizing the investments of others to a greater extent. See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C. 2d 849, 855 (1982). In 1982, the FCC determined that a limited partnership could qualify as a minority enterprise under the Commission's distress sale policy if the general partner is a member of a minority group who holds at least 20 percent ownership and who will exercise complete control over a station's affairs. Id.

[4] The renewal application had been the subject of one of several unremitting attacks by Shurberg against the station's past, current and proposed licensees. One of Shurberg's earliest assaults came in December 1983 in the form of a failed attempt to file with the Commission a competing application against Faith Center's deferred renewal application (See FCC File No. BPCT-831203KF). The Commission refused to accept Shurberg's application because the station's renewal application was in hearing status at the time.

ACCLP, held a 70% ownership interest in ACCLP. The assignment application further reflected that, in addition to its limited partnership interest in the assignee, Astroline Company was also the owner of all of the outstanding common stock of WHCT Management, Inc. (See Attach. D, Ex. 3). During the period in issue, Mr. Ramirez's 21% ownership interest in ACCLP did not change, as reflected in an exhibit introduced in the bankruptcy hearing (See Attach. E which was Exhibit 157 in the Bankruptcy Court proceeding).[5/]

6. ACCLP consummated its acquisition of WHCT-TV in January 1985, made substantial improvements to the station's physical plant and operated the station on the air between 1985 and 1991. During this entire period of time, Shurberg pursued litigation in the courts contesting ACCLP's right to acquire the station which resulted in substantial expenses for ACCLP as well as legal uncertainty as to the status of its license. Shurberg's attack was founded on the constitutionality of the Commission's distress sale policy; and because the FCC wavered in its defense of the policy during the course of the litigation, ACCLP faced the task of defending the policy. The legal uncertainty created by Shurberg prevented ACCLP from obtaining the bank financing that it had originally anticipated and contributed materially to the financial plight of the station.

7. On October 31, 1988, certain creditors of ACCLP (namely, program suppliers) filed an involuntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. At ACCLP's request, the Bankruptcy Court converted the case to one under Chapter 11. However,

---

5/ Ownership information filed with the FCC (see, e.g., Attach. F) also reflected that Mr. Boling was an officer and director of general partner WHCT Management, Inc.; Herbert A. Sostek ("Sostek") was Chairman of the Board and a director of general partner WHCT Management, Inc.; and Richard H. Gibbs was a Vice President and Director. Boling, Sostek and Richard H. Gibbs, along with Randall L. Gibbs, were also both general and limited partners of Astroline Company. (Attachs. D and F).

upon motion by the Official Committee of Unsecured Creditors, the Debtor's case was reconverted to a case under Chapter 7 on April 9, 1991.[6/] During this period, ACCLP filed a short form assignment application to ACCLP, Debtor in Possession, and subsequently filed a short form application to assign WHCT-TV to the Trustee (See FCC File No. BALCT-910506KH). The Commission granted this assignment on May 24, 1991, and the grant became final on July 7, 1991. In September 1993, the Trustee filed with the Commission an application on FCC Form 314 to assign WHCT-TV to Two If By Sea Broadcasting Corporation ("TIBS") in order to satisfy the claims of ACCLP's creditors.

8. In the meantime, ACCLP had filed an application for renewal of license for WHCT-TV in December 1988. In February 1991, the Commission reinstated the competing application that Shurberg had attempted to file against the station's previous license renewal application eight years earlier. See Public Notice, Report No. 14926 (released February 8, 1991). On November 3, 1993, Shurberg petitioned the Commission to dismiss or deny both the assignment application and the pending license renewal application and to immediately grant its competing application for the station. Shurberg called into question, among other things, the truth of representations made by ACCLP regarding its status as a minority-controlled entity pursuant to the Commission's distress sale policy. Shurberg's petition alleged that the Trustee held the licenses for WHCT-TV only because ACCLP successfully acquired the station based on supposed "blatant and repeated misrepresentations to the Commission and the courts."[7/] (Pet. to

---

6/ The conversion to Chapter 7 occurred after ACCLP had achieved a positive cash flow and after numerous attempts to settle the case with the creditors. As ACCLP's General Partner, Mr. Ramirez vigorously contested the conversion.

7/ Shurberg's petition concerned ACCLP's representations that it was a minority-controlled limited partnership in pleadings filed with the FCC, the U.S. Court of Appeals for the (continued...)

Dismiss or Deny, p. 10).

9. What Shurberg's petition and related filings all conveniently failed to disclose to the Commission, however, is that the pleadings upon which Shurberg relied to support its allegations and the facts presented therein were fully litigated in, and disposed of by, the civil courts to which they were proffered in the first instance. Those courts, beginning with the United States Bankruptcy Court for the District of Connecticut and continuing all the way through the United States Court of Appeals for the Second Circuit have consistently determined that Ramirez was in control of ACCLP and that ACCLP's limited partners did not act as general partners. Thus, it was Shurberg, not Astroline or its successors, who was misleading the Commission and the courts by never disclosing the 1995 Bankruptcy Court decision, the 1996 District Court decision or the 1997 Second Circuit decision.

10. Both the general and limited partners of ACCLP were sued in the bankruptcy proceeding. Richard Ramirez spent considerable sums to defend his reputation and voluntarily testified in a lengthy deposition and for several days during the trial. The last thing that Mr.

7/ (...continued)
D.C. Circuit, and the Supreme Court. These proceedings culminated in the Supreme Court's decision in Metro Broadcasting, which was decided together with Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc., et al. ("Astroline"). See Metro Broadcasting, Inc. v. Federal Communications Commission et al., 110 S. Ct. 2997 (1990). The Astroline line of cases addressed and upheld the constitutionality of the Commission's distress sale policy. In pleadings filed with the Commission and the U.S. Court of Appeals for the D.C. Circuit between 1993 and mid-February 1997, Shurberg continued to accuse ACCLP of fraudulent conduct. See, e.g., Shurberg's "Formal Opposition to, and Motion to Strike, Letter Request Seeking Emergency Relief," filed December 27, 1996, and Shuberg's "Supplement to Emergency Petition to Recall Mandate" filed with the U.S. Court of Appeals for the D.C. Circuit filed February 10, 1997. However, as demonstrated herein, the Second Circuit as well as the Bankruptcy and District Courts before it, have already thoroughly examined the allegations advanced by Shurberg, a fact Shurberg never mentioned in its pleadings.

Ramirez, or anyone else, envisioned was the possibility that the allegations resolved in the bankruptcy would be revisited in their entirety by the FCC.

11. As a result of Shurberg's allegations and without any recognition of the court decisions resolving the allegations in ACCLP's favor, on April 28, 1997, the Commission designated for hearing the issue of whether ACCLP misrepresented facts to the Commission and the Federal Courts in connection with statements it made concerning its status as a minority-controlled entity and whether the public interest would be served by a grant of the renewal application filed by the Trustee. The Commission's action came without any warning to the Petitioner and provided no opportunity for him to set the record straight. See n.2, supra.

12. Ramirez has already litigated this case once. It is unconscionable that he must re-litigate the same facts to counter the harmful allegations in the HDO and injury to his reputation they may have generated. Indeed, the Commission appears to be punishing minorities, not assisting them, as originally contemplated by the distress sale policy. As demonstrated herein, because the civil proceeding was so extensive in its inquiry into the operation of ACCLP, there is no need to revisit the Court's findings and conclusions.

13. In designating this case for hearing, the Commission also refused to apply its Second Thursday doctrine[8/] pursuant to which the Commission, in bankruptcy cases, has a policy of accommodating the concerns underlying bankruptcy laws, such as the protection of innocent creditors. The Commission's refusal to apply its Second Thursday doctrine was based on an erroneous depiction of the facts and cannot be reconciled with Commission action in similar cases and is therefore arbitrary and capricious.

8/ Second Thursday Corp., 22 F.C.C. 2d 515, recon. granted, 25 F.C.C.2d 112 (1970).

II. THE INSTANT PROCEEDING SHOULD NOT HAVE BEEN DESIGNATED FOR HEARING

14. As detailed below, the Commission's decision to designate this proceeding for hearing cannot be justified. First, the Commission must accord full faith and credit to the determinations of the civil courts. The line of inquiry that the Commission intends to follow in the hearing has already been fully and completely explored; ACCLP, and its general partners, Ramirez, and WHCT Management, Inc., as well as limited partner Astroline Company and the partners thereof, have been subjected to a full hearing in the U.S. Bankruptcy Court for the District of Connecticut, as well as subsequent appeals. Designating this proceeding for hearing upsets judicial and administrative efficiency. Second, the Commission's decision to designate this proceeding cannot be reconciled with its recent MobileMedia decision. The Commission erred in refusing to apply its Second Thursday doctrine to the facts of this proceeding, ignoring over twenty years of policy and precedent. In MobileMedia, the Commission issued a stay and commenced a Second Thursday inquiry based on facts far less compelling than those in this proceeding.

A. The Allegations At Issue Have Already Been Addressed and Rejected in the Civil Court Proceedings

15. The Connecticut Bankruptcy Court case was initiated by the Trustee for the benefit of ACCLP's creditors and sought to recover over $30 million. The lawsuit was vigorously fought by prominent law firms who conducted extensive depositions, litigated a nine day trial with numerous witnesses before the Bankruptcy Judge and introduced over 300 trial exhibits.

16. To the Petitioner's knowledge, no prior hearing designation order has been premised on allegations made by one party to a civil court case without any recognition of the

position of the other parties and without any consideration of the outcome of the case. Those facts alone mandate reconsideration here in the name of fairness to the Petitioner.

17. Had the Commission examined the bankruptcy proceeding, it would have realized that Shurberg's allegations had been fully addressed by the Bankruptcy Court. The Memorandum of Decision of the Chief Bankruptcy Judge dated October 24, 1995, is attached as Attachment A. The Ruling on Appeal from Bankruptcy Order issued by a United States District Judge of the United States District Court, District of Connecticut, dated August 12, 1996, is attached as Attachment B. The Summary Order of a three judge panel of the U.S. Court of Appeals for the Second Circuit, composed of the Chief Judge, a Circuit Judge and a District Judge, dated April 17, 1997, is attached as Attachment C.

18. Shurberg's allegations at the FCC were entirely based on allegations taken from a pleading filed by the Trustee in the Bankruptcy Court proceeding which claimed that "[ACCLP's non-minority limited partners] were involved in the daily operations and acted as general partners of [ACCLP] in various ways . . ." (Pet. to Dismiss or Deny, p. 9). At the time the Trustee advanced the allegation, he was seeking to obtain over $30 million for the creditors and hoped to accomplish this by reaching the pockets of the limited partners. However, the Bankruptcy Court decision, which Shurberg never brought to the Commission's attention, rejected the Trustee's allegation stating:

> Ramirez developed a business and operating plan for Channel 18, hired Terry Planell ("Planell"), a native of Cuba and a person experienced in television programming, to be station manager, and Alfred Rozanski ("Rozanski") to be the Debtor's business manager. While Ramirez and Rozanski met with Boling on occasion to explain the Debtor's annual budget, throughout the 1985-1988 time period when Channel 18 was operating, Ramirez and Planell, together or separately, handled the matters of hiring and firing of station personnel, station

> programming, equipment purchases, and dealing with the Debtor's vendors.

(Attach. C, page 5).

> The court concludes that Astroline Company's activities in connection with the Debtor do not meet the standard of substantially the same as the exercise of the powers of a general partner. Despite the intense level of investigation undertaken by the Trustee of the Debtor's prepetition history, the court would have to engage in conjecture and surmise to find any control of the Debtor's day-to-day operation of the Channel 18 television station. The court credits the testimony of Ramirez, supported by that of Planell and Rozanski, that he, as the managing general partner, exercised fully his powers as such, and that Astroline Company had no equal voice in his decisions.

(Attach. C, page 18-19).

> The Cash Management System, with Astroline Company in control of the Debtor's checkbook and the sweeping of all of the Debtor's income to the out-of-state bank, certainly justifies the Trustee's questioning of the status of Astroline Company as simply a limited partner of the Debtor. The court, however, cannot find as a fact that Astroline Company ever did anything more than prepare the checks as directed by Ramirez or Rozanski and add to the Debtor's bank account those funds necessary to make good the issued checks. Funding in this manner reduced the borrowing costs of Astroline Company. While Astroline Company had the power to empty the Debtor's bank account, it never did so; neither did it refuse to prepare checks in order to override any decision of Ramirez. Ramirez testified that until the funding by Astroline Company ceased, every invoice was paid that he wanted paid. All of the relatively few checks which were signed by the Astroline Company partners, except for two, were adequately explained as due to Ramirez's absence, or for other reasonable considerations.

(Attach. C, page 19).

The Chief Judge of the Bankruptcy Court concluded that "the actions of Astroline Company, proven at trial, do not constitute participation in control of the business substantially the same as the exercise of the powers of a general partner." (Attach. A, p. 20).

19. The Bankruptcy Court also extensively considered the issue of whether Ramirez retained his 21% ownership interest in ACCLP. Ramirez and two partners of the well known accounting firm of Arthur Andersen, LLP ("Arthur Andersen") testified concerning this matter. Kent Davenport, a partner at Arthur Andersen and a tax attorney, testified that special allocations were permitted under the Internal Revenue Code which allowed profit and loss allocations to differ from ownership percentages. Because of the substantial losses that were incurred by Astroline Company's limited partners (in part due to Shurberg's continued attacks on the license), Arthur Andersen recommended that ACCLP's losses be allocated to the limited partners until ACCLP began generating profits, at which time income would be allocated to the limited partners until their losses had been offset, bringing their capital accounts back to zero. (Kent Davenport testimony, Tr. 6-85 - 6-87, attached hereto as Attach. G). Documents prepared by Arthur Anderson memorializing this advice are attached as Attachs. H and I. Attach. H, a May 1985 memorandum, recommended such an allocation. This attachment was Exhibit 41 in the Bankruptcy case which Mr. Davenport referred to in his testimony. Exhibit 118 in the Bankruptcy Court proceeding, attached hereto as Attach. I, consists of ACCLP's Financial Statements for the year ended December 31, 1986. The Notes to the Financial Statements reflect the following:

> Profits, losses and cash flow are allocated 99% to the limited partners as a class and 1% to the general partners as a class until the limited partners are repaid their capital contributions, plus a return (based on the prime interest rate) on any contributions funded by the limited partners. The total amount contributed to the

> Partnership by the limited partners was $18,310,999.
>
> Subsequent to these distributions, the two individual general partners will receive a priority distribution of $1,000,000 after which all further profits, losses and cash flow will be allocated in accordance with the ownership percentages in the Partnership agreement.
>
> The limited partners have a 72% ownership interest in the Partnership with the remaining 28% ownership allocated to the general partners.

(Attach. I, pp. 8-9).

Thus, the IRS returns submitted by Mr. Ramirez and the limited partners of Astroline Company simply reflected the tax allocation that Arthur Andersen had recommended. That allocation, which was considered in the Bankruptcy Court case, did not change Mr. Ramirez's 21% ownership interest at all. (See Attach. F). Mr. Ramirez also testified during the Bankruptcy case that he had a 21% interest in ACCLP and control of its operations as well.

20. The Commission has stated that it has generally found "control" to be in those who have authority to determine the basic policies of a station's operations, including programming, personnel and financial matters. See Southwest Texas Broadcasting Council, 85 F.C.C. 2d 713, 715 (1981). The Bankruptcy Court trial and decision fully addressed all of these aspects and found in favor of ACCLP, and both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit affirmed the decision of the Bankruptcy Court.[9/] It would not serve the public interest to re-litigate all of these matters.

[9/] The District Court affirmed the judgment on the ground that the Trustee lacked standing to assert his claim against the limited partners. The Second Circuit held that even if the Trustee might have lacked standing, the Limited Partners would not be held liable under Massachusetts law. The Second Circuit specifically reviewed and affirmed the Bankruptcy Court's factual findings.

21. As determined by the civil courts and in accordance with the Commission's general policy, Ramirez retained authority to determine the basic policies of the station's operations, including programming, personnel and financial matters. These holdings are consistent with ACCLP's candid representations to the Commission and the courts regarding its status as a minority-controlled entity.

22. On March 29, 1984, the Commission adopted a Report and Order in Attribution of Ownership Interests, 97 F.C.C.2d 997, (released April 30, 1984), setting forth standards for attributing interests in broadcast properties. The Commission's Report and Order stated that limited partners would be exempt from attribution where the limited partnership conforms in all significant respects to the provisions of the RULPA. 97 F.C.C.2d at 1022-23. ACCLP's application to acquire WHCT-TV was filed in May 1984 and granted in December 1984. During this period, the Commission standard for evaluating attribution of limited partners was compliance with the RULPA.[10/]

23. Significantly, the Bankruptcy Court examined the conduct of ACCLP's limited partners and the operation of ACCLP under the provisions of the Massachusetts Limited Partnership Act (the "MLPA") Mass. Gen. L. ch. 109, as revised in 1982, pursuant to which ACCLP was organized. (See Attach. A). The MLPA, as revised in 1982 is based upon the Revised Uniform Limited Partnership Act of 1976 (the "RULPA"). Compliance with the MLPA

[10/] Subsequent to the grant of ACCLP's assignment application and well after the assignment had been consummated, the Commission adopted insulation guidelines for limited partnerships which identified various criteria which the Commission stated that it would use to determine whether limited partners were complying with the Commission's policies. See Multiple and Cross-Ownership of AM, FM, TV and CATV Systems, 55 R.R.2d 604 (released June 24, 1985). These guidelines did not become effective until July 31, 1985, and the Commission's Memorandum Opinion and Order does not reflect any intention by the Commission to apply these guidelines retroactively.

and the RULPA was a substantial focus of the post-trial memoranda filed by the parties to the bankruptcy proceeding. The U.S. Court of Appeals for the Second Circuit affirmed the factual findings of the Bankruptcy Court, stating that "the Limited Partners did not participate in and did not exercise any quantum of control over numerous and significant aspects of the Debtor's business. Their control of the Debtor was not 'substantially the same as the exercise of the powers of a general partner.' See Mass. Gen. Laws §19." (Attach. C, p.4).

24. The factual findings of the Connecticut Bankruptcy Court concerning a matter of partnership law (namely, that ACCLP complied with the MLPA and the RULPA), must be accorded full faith and credit by the Commission. This is not an area in which the Commission has expertise. Moreover, this was the very standard that the Commission had announced was appropriate in evaluating limited partnerships.

25. Consequently, the civil adjudications of the issues now before the Commission render a Commission hearing of the same matters redundant, unnecessary and a waste of the public's resources. Given the Commission's limited budgetary resources to try hearing cases, re-litigating these matters would contravene sound practice on the part of the agency. Based on the civil courts' exhaustive analyses of the very facts that are now presented before the Commission, the law has steadfastly recognized that Ramirez did in fact exercise complete control over the affairs of WHCT-TV at all times.

B. The Presiding Judge Should Accord the Decisions of the United States Bankruptcy Court for the District of Connecticut, the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit Full Faith and Credit and Delete the Designated Misrepresentation Issue.

26. The Commission has designated for hearing the issues of whether ACCLP misrepresented facts to the Commission and the federal courts in statements ACCLP made

concerning its status as a minority-controlled entity and whether the public interest, convenience and necessity would be served by a grant of the renewal application filed by the Trustee. Despite the fact that three courts have already rejected Shurberg's allegations, Shurberg nevertheless contends that the Commission should review these issues. This contention ignores the constitutional requirement that the Commission must accord court decisions full faith and credit.

27. In order to prevent Article III courts from rendering advisory opinions, neither the executive nor legislative branch of government may review an Article III court decision. Town of Deerfield, New York, 992 F.2d 420, 428 (2nd Cir.1993). "Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no such power . . . [n]or may an administrative agency choose simply to ignore a federal-court judgment." Id. Yet this is exactly what Shurberg has requested the Commission to do. Quite simply, any attempt by the Commission "to arrogate to itself the power to (a) review or (b) ignore the judgments of [Article III] courts . . . [is] impermissible as a matter of law." Town of Deerfield, New York, 992 F.2d 420, 430 (2nd Cir. 1993).[11/]

28. Under the circumstances presented here, deletion of the designated issue is the appropriate remedy. The Commission has stated that "[w]here, as here, it is established that

---

11/ Further, the ACCLP assignment of the license for Station WHCT-TV to the Trustee became final nearly six years ago, on July 7, 1991. It is bad policy for the Commission to revisit the finality of a grant six years later. If the Commission were to now adopt a policy of reconsidering its actions regarding license assignments years after the assignments have become final, licensees would not be able to rely on the validity of their grants. In these times of relaxed ownership restrictions, broadcast licenses are changing hands several times in relatively short periods of time. The reconsideration of an assignment that occurred several years in the past could negate an entire chain of assignments. This alone should be an independent basis for staying the hearing and rescinding the designation order.

issues have been inadvertently specified because all of the facts were not considered, petitions to delete will receive favorable consideration." Salter Broadcasting Company (WBEL) et al., 8 F.C.C.2d 212, 213, (Rev. Bd. 1967) citing Cleveland Broadcasting, Inc., FCC 63R-519, 1 R.R.2d 676 (Rev. Bd. 1963) and KFOX, Inc. (KFOX), FCC 65R-80, (Rev. Bd. released March 4, 1965). In Salter, the Review Board deleted an air hazard issue. In Cleveland, the Board deleted a financial issue designated by the Commission where the Commission erred in computing an applicant's costs of construction. In Centreville Broadcasting Co., FCC 71R-62, 21 R.R.2d 216 (Rev. Bd. 1971), a financial issue was deleted where the Commission had overlooked an amendment to the application. In WOIC, Inc., 44 F.C.C. 2d 891, 893 (1974), the Commission deleted issues in response to a petition for special relief after determining that the issues were improvidently designated.

29. The failure to consider the outcome of a court case involving the very same allegation that led to designation of an issue is a particularly unusual and unique circumstance justifying reconsideration of the HDO and deletion of the misrepresentation issue. This is such a compelling circumstance that it cannot be ignored or trivialized.

30. As noted earlier (n.1), the Presiding Judge has the authority to delete the misrepresentation issue and deletion is appropriate here. The Commission has stated that "where the facts and arguments made to the subordinate officials establish that we did not fully consider the matter or that our ruling was based upon an incomplete or incorrect showing, the subordinate officials will be justified in arriving at a different ruling on that particular question." Fidelity Radio, Inc., 6 R.R.2d 140, 142 (1965).

C. The Manner In Which This Proceeding Was Designated Has Been Extremely Unfair

31. Shurberg's allegations, based on one party's pleadings in the Connecticut bankruptcy proceeding, were filed with the Commission on November 3, 1993. The bankruptcy court proceeding was concluded on October 24, 1995. The U.S. District Court decision was issued August 12, 1996 and the Second Circuit's Summary Order affirming the lower court decisions was issued April 7, 1997. At no time did Shurberg bring to the Commission's attention the outcome of the Bankruptcy Court proceeding. At no time did the Commission inquire as to the outcome despite the passage of three and a half years.

32. In light of the facts that Shurberg never informed the Commission of the outcome of the bankruptcy litigation and that the FCC did not independently verify the status of the Connecticut case before issuing the HDO, and neither Shurberg nor the FCC gave ACCLP or Ramirez any notice of its intent to designate the proceeding on a misrepresentation issue, the Petitioner has suffered undue prejudice. The prejudice here is so great that it independently warrants the stay and emergency relief requested by Petitioner. Cf. E.E.O.C. v. Moore Group, Inc., 416 F.Supp. 1002 (N.D. Ga. 1976).

III. THE COMMISSION SHOULD STAY THIS PROCEEDING

A. Stay of the Hearing Is Warranted Under Well Established Case Precedent

33. A stay of the hearing to determine ACCLP's qualifications as a Commission licensee is warranted in this case. It is well-established that the Commission will grant a stay where a petitioner has made an appropriate showing under the four well-known criteria enunciated in Virginia Petroleum Jobbers Assn. v. EPC, 259 F.2d 921 (D.C. Cir. 1958) ("Virginia Petroleum Jobbers"), as interpreted in Washington Metropolitan Area Transit

Commission v. Holiday Tours, Inc., 559 F.2d 841 (1977). Pursuant to the Virginia Petroleum Jobbers line of cases, the Commission will grant a stay where (1) the party seeking the stay is likely to prevail on the merits of the appeal; (2) the moving party is likely to be irreparably harmed absent a stay; (3) others are not likely to be harmed if the Commission grants the stay; and (4) grant of the stay is in the public interest. In the past, the Commission has frequently stayed hearing proceedings pending the Commission's consideration of Second Thursday and similar solutions.[12/]

34. All of the above criteria are met in this case. First, the Petitioner is likely to prevail on the merits on reconsideration of the Commission's designation of this matter for hearing. The Commission's designation of this matter for hearing failed to account for the fact that the very issues that have been designated for hearing have already been exhaustively reviewed and adjudicated in the civil court system and have been resolved by three courts in ACCLP's favor. Full faith and credit must be accorded these decisions. As shown above, it would be utterly unfair, inefficient, counterproductive and contrary to the public interest to re-litigate matters that have already been thoroughly adjudicated in a civil proceeding.

35. Second, both Ramirez and ACCLP's creditors will be irreparably harmed if the Commission does not order a stay as requested herein. Mr. Ramirez's livelihood is in broadcasting and the instant proceeding constitutes an unwarranted blemish on his reputation. He will be particularly harmed if a stay is not granted. The creditors will be harmed by their continued inability to recoup their losses.

12/ See, e.g., Oyate, Inc., 3 F.C.C. Rcd 3940 (1988); KOZN(FM) Stereo 99, Ltd., 3 F.C.C. Rcd 877, 877 (1988); Cosmopolitan Enterprises, Inc., 73 F.C.C. 2d 700, 701 (1979). See also Atkins Broadcasting, 8 F.C.C. Rcd 6321, 6322 (Mass Media Bur. 1993); Allan H. Weiner, 1986 Lexis 3580 (Mass Media Bur. 1986) (stay granted and twice extended); Blue Ribbon Broadcasting, Inc., 90 F.C.C.2d 1029, 1030-31 (ALJ 1981).

36. Third, no harm will be caused to others if a stay is granted. Shurberg has no claim to operate a television station on Channel 18 in Hartford, Connecticut.[13/] No one has a right to perpetuate litigation that has already been adjudicated and resolved. Any delay resulting from a stay will be minimal in comparison to the great value achieved by the Commission in reaching the correct result on the important questions presented.

37. Finally, the public interest weighs heavily in favor of a stay. Finality of decisions and efficiency of governmental processes serve the public interest. The public must be able to rely on court proceedings which have been duly adjudicated in the appropriate forums. The re-litigation of matters that have already been resolved only wastes public resources that could more appropriately be allocated elsewhere. Further, the public interest weighs in favor of satisfying the claims of creditors. Thus, the facts and law both compel a Commission decision in favor of granting a stay.

B. A Stay Of This Proceeding Is Mandated By The Recent MobileMedia Decision.

38. Just last month, the full Commission granted a stay of a license revocation hearing. See MobileMedia, supra.[14/] In MobileMedia, the bankrupt petitioner reported to the Commission that it had filed with the Commission at least 289 false notifications and 94 defective applications. The truthfulness of even that report was questionable and was designated as an issue to be determined in the hearing. The Commission nevertheless ordered a stay of the hearing to afford the bankrupt petitioner the opportunity to make a showing under the Second Thursday doctrine despite its findings that "the scope of the [petitioner's] conduct [was]

13/ A stay will also give the Commission the opportunity to evaluate Shurberg's actions and conduct in failing to inform the Commission of the results of the court proceedings.

14/ In that case, the Commission overruled an ALJ's denial of the stay request, which sought the stay in order that the petitioner could pursue Second Thursday relief.

extremely serious" and the petitioner's repeated infractions [were] "unprecedented . . . in terms of the sheer number of false filings involved," Id. at ¶¶ 12 and 13 (emphasis added). Emphasizing that it "simply will not countenance the kind of behavior at issue in this case involving hundreds of misrepresentations to the FCC," Id. at ¶ 13 (emphasis added), the Commission decided to suspend the hearing in MobileMedia because the Commission recognized that the petitioner fell within its Second Thursday doctrine and therefore was eligible to pursue Second Thursday relief despite its grave transgressions.[15/]

39. In direct contravention of its established precedent, the Commission refused to apply its Second Thursday doctrine in the instant case. The Commission attributed its refusal to apply Second Thursday to the "severity of the misconduct alleged by Shurberg" against ACCLP. (HDO at para. 11). However, the Commission reached this characterization without consideration of the Connecticut Bankruptcy Court proceeding, the District Court case or the Second Circuit's Order affirming the Bankruptcy Court's decision. In the civil proceeding, the courts found that ACCLP complied with the Massachusetts Limited Partnership Act, which was based on the Revised Limited Partnership Act, -- the very standard that was applicable to limited partnerships at the time ACCLP's application was filed and granted. The Commission's refusal to apply the Second Thursday doctrine in light of the "severity of the misconduct alleged" was a fundamental error on the part of the Commission which did not realize that the civil courts already had considered the allegations and rejected them. Thus, in light of the civil court

---

15/ In MobileMedia, the Commission stated that a showing that the potential wrongdoers could be prevented from realizing anything more than minimal benefits through assignment of the facilities was sufficient to justify a temporary suspension of the hearing for the bankrupt petitioner to pursue Second Thursday relief. See MobileMedia at 5. In the instant case, the only claim of limited partner Astroline Company, Inc. is a secured claim that, under controlling federal bankruptcy law, 11 U.S.C §726, does not receive rights to distribution from the bankruptcy estate.